bany, New York, on March 15, 1949, and March 15, 1950, respectively.

Petitioner Margaret K. Holt is an individual who resides at 45 Roweland Avenue, Delmar, Albany County, New York. The taxable years involved in this proceeding are the calendar years 1948 and 1949 and the returns for said years were timely filed with the collector of internal revenue for the district of Albany, New York.

Separate notices of deficiency were mailed to Margaret K. Holt and to Harold Holt on January 22, 1953.

The Holts were married on August 28, 1924. The sole issue of the marriage is a daughter, Mary Elizabeth Holt, born January 8, 1927.

In February 1947, Margaret K. Holt commenced an action in the Supreme Court, Albany County, State of New York, for a legal separation.

Upon motion of Margaret K. Holt dated May 13, 1947, the Supreme Court, Albany County, New York, ordered Harold Holt to pay $50.00 each week commencing May 23, 1947, for his wife's support and maintenance.

On December 24, 1947, Harold Holt and Margaret Holt entered into a separation agreement containing provisions for various payments to Mrs. Holt including payments of $50 per week for support and maintenance so long as she shall live and not remarry. Further reference to the provisions of said agreement will be made hereafter. A copy thereof is attached to the stipulation of facts and is a part thereof.

The action for legal separation theretofore instituted by Margaret K. Holt was discontinued by Order of the said Supreme Court of New York dated January 5, 1948, upon the basis of a stipulation for discontinuance dated December 24, 1947, signed by the parties to said action.

On January 22, 1948, Harold Holt instituted an action for divorce from the said Margaret Holt upon the ground

of desertion in the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida. On February 27, 1948, the Court awarded to Harold Holt a final decree of divorce *a vinculo matrimonii* from Margaret K. Holt. The agreement of December 24, 1947, was not incorporated in the decree. Said decree made no reference to said agreement and made no provisions for the wife's support and maintenance. The agreement was not presented to the Court because it was feared that the Florida Court might draw the conclusion that there had been collusion.

Harold Holt paid the sum of $50 to Margaret K. Holt each week from November 28, 1947, and each week thereafter during the years 1948 and 1949, or a total of $2,600 in each of said years.

Of the amount so paid in 1948, a total of $400 was paid prior to the decree of February 27, 1948, and $2,200 was paid subsequent to such decree.

Petitioners had been permanently separated since sometime in 1945, although Mrs. Holt made unsuccessful efforts to bring about a reconciliation. From the time of the separation, Mr. Holt wanted a divorce. Mrs. Holt was aware of this, but at all times opposed the idea. She had no knowledge of any definite intention on the part of Mr. Holt to file a particular action to obtain a divorce and was not informed of the action in Florida until after it was instituted. She had previously refused to file divorce proceedings. The separation proceedings in New York were filed by her in the belief that this was the only means by which she could force her husband to furnish support and maintenance. Negotiations during the pendency of these proceedings resulted in the agreement of December 24, 1947, which accomplished her objective, and the proceedings were dismissed.

Mrs. Holt's objections to divorce were based upon religious grounds. She believed in the principles of the Bahai faith, which opposed divorce.

The usual provision that in the event of a divorce the terms of the separation agreement might be incorporated in the divorce decree was not included in the separation agreement of December 24, 1947 because petitioner Margaret K. Holt would not agree. She was opposed to anything which would in any way indicate a divorce.

During the negotiations which led to the separation agreement of December 24, 1947, neither Mrs. Holt nor her counsel was informed that Mr. Holt had gone or was going to Florida to establish a residence there and institute divorce proceedings. Mr. Holt did at that time contemplate such action, and had already begun to establish a Florida residence.

When Mrs. Holt first received notice of the fact that the Florida divorce proceedings had been instituted, she requested her attorney to appear and defend the proceedings. Later, on her attorney's advice, she decided not to contest.

Mrs. Holt's counsel advised her, at the time she entered into the agreement of December 24, 1947, that she would not have to pay income tax on the weekly payments provided therein for her support and maintenance.

The agreement of December 24, 1947, contained the following provision:

> • • • Except, however, that the wife does not release, nor shall this agreement be construed to release, any obligation of the husband to his wife or her attorneys for legal services and disbursements in any action or proceeding which may arise in the future, including any action or proceeding in connection with the provisions of this agreement.

Findings of Ultimate Facts.

The husband wanted a divorce.

The wife did not want a divorce; was unwilling to institute proceedings to obtain one; and was unwilling to agree not to oppose a divorce proceeding if her husband instituted it.

The wife was aware that the husband wanted a divorce, but was not aware that he had any definite plans to institute proceedings, or that he was establishing a Florida residence and intended to apply for a divorce there. Her first information concerning the proceeding was when she received formal notice that it had been instituted.

There was no mutuality of intention on the part of Mr. and Mrs. Holt that the agreement of December 24, 1947, and the payments provided therein were to be deemed incident to a subsequent divorce, in Florida or elsewhere.

There was no mutuality of understanding between Mr. and Mrs. Holt that, in the event of subsequent divorce, the agreement of December 24, 1947, was to be incorporated in the decree, or was, from the perspective of Federal income taxes, to be deemed, in the event of such divorce, as determinative of the fact that the payments provided therein were to be taxable to the wife and deductible by the husband, or the opposite.

The agreement did not refer to a possible subsequent divorce or incorporation in any divorce decree. The Florida decree did not refer to the agreement or include any provision for support and maintenance. The agreement was not brought to the attention of the Florida Court.

Opinion.

OPPER, Judge: On the foregoing ultimate findings of fact the fundamental question presented is whether a support agreement is "incident" to[1] a subsequent divorce under section 22 (k) where the wife does not want a divorce, has no knowledge that the husband has plans to institute divorce proceedings, and there is no mutuality of intent or plan and no objective evidence that such agreement was to be deemed incident to a divorce. The case is no stronger for a tax upon the wife in any respect than was *Florence B. Moses*, 18 T. C. 1020, where we said (at 1024):

> The evidence does not indicate that the parties entering into the agreement contemplated divorce proceedings as were true in *Bertram G. Zilmer*, 16 T. C. 365. If plans for a divorce following the agreement were held by Albert Moses [the husband], he did not bring them to light. The fact that one party may be considering the possibility of a divorce is not sufficient to make the voluntary separation agreement an incident to a divorce later obtained. *Cecil A. Miller*, 16 T. C. 1010. Although there is no requirement of positive proof that both parties jointly and positively anticipated legal divorce or separation at the moment they signed the

---

1 SEC. 22. GROSS INCOME.

* * * * * * * * *

(k) *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument *incident to such divorce or separation* shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. * * * (Italics added.)

> agreement, *Izrastzoff v. Commissioner*, 193 F. 2d 625, affirming *Estate of Daniel G. Reid*, 15 T. C. 573, the actions and conduct of the parties, the time between agreement and divorce proceedings, and the participation of the parties in obtaining a divorce are elements and factors to be considered.
>
> Upon examination of the evidence, we are left with the conclusion that if a divorce had been made the consideration for entering into the voluntary separation agreement, the petitioner would not have executed the agreement • • •

If anything the instant proceeding presents a stronger case for taxing the husband than did *Florence B. Moses, supra.* In that case the opinion continued:

> The respondent contends that section 21 of the agreement demonstrates that both husband and wife contemplated a divorce. That section declared that the provisions of the agreement may be incorporated in the final judgment or decree of divorce in any action brought by either party. • • •

On the contrary the present circumstances are, as our findings show, that such a provision was proposed and categorically rejected by the wife thereby putting the husband on notice that the agreement was not being made and could not be construed as having been intended as an incident to any divorce. Cf., e. g., *Bertram G. Zilmer*, 16 T. C. 365, and *Estate of Daniel G. Reid*, 15 T. C. 573, affd. *sum nom. Izrastzoff v. Commissioner* (C. A. 2), 193 F. 2d 625, with *Joseph J. Lerner*, 15 T. C. 379, revd. (C. A. 2) 195 F. 2d 296.

We are of course not unaware that the *Moses* case has been reversed (C. A. 2) 214 F. 2d 912, August 11, 1954. If the fact just stated is not adequate to distinguish the

two results,[2] we must respectfully adhere to the position previously taken by the cases decided in the Tax Court. "Not every agreement which is followed by a divorce is 'incident to' the divorce within the meaning and intent of section 22 (k). * * * The chief difficulty has been to determine from the facts in each individual case whether the necessary connection between the two exists."[3] *Cecil A. Miller*, 16 T. C. 1010, 1013, 1014, revd. (C. A. 9) 199 F. 2d 597. We conclude that under the facts as found the payments were not made under an agreement incident to a divorce.

Reviewed by the Court.

Decisions will be entered under Rule 50.

FISHER, J., dissenting: I fully concur in the Findings of Fact as set forth in conjunction with the majority Opinion.

While pointing out a possible distinction in the facts (to be discussed *infra*) the majority Opinion bases its views substantially on the reasoning of this Court in *Florence B. Moses*, 18 T. C. 1020. The decision in the *Moses* case, as stated in the majority Opinion in the instant case, was reversed by the Court of Appeals for

---

2

Lerner v. Commissioner (C. A. 2), 195 F. 2d 296, reversing 15 T. C. 379, may be distinguished on the same grounds as those set forth in the *Moses* case (p. 1024): "The voluntary separation agreement was not employed by the court granting the divorce in establishing the legal and economic relationships between the parties as was true in *Lerner v. Commissioner* * * *"

3

And see, e. g., *Jane C. Grant*, 18 T. C. 1013, affd. (C. A. 2) 209 F. 2d 430, decided the day before the *Moses* case where we held as a matter of fact that the agreement was incident to a divorce.

e Second Circuit in 214 F. 2d 912, as was *Joseph J.*
rner v. Commissioner, 15 T. C. 379 (see 195 F. 2d 296).
spite the reasoning supporting the reversals, the ma-
rity Opinion adheres to the previous position taken
this Court in said cases.

I have dissented because, in my opinion, for the rea-
ns hereinafter set forth, the reasoning of the Second
rcuit presents the better view.

The majority Opinion of this Court rests substantially
on the following: There was no mutuality of intent
the part of Mr. and Mrs. Holt either to obtain a di-
rce or, in the event that a decree of divorce should en-
e, that the agreement for support was to be deemed
ident thereto; that while the husband wanted a di-
rce, the wife was flatly opposed to it; that while the
fe knew her husband wanted a divorce, she was unaware
any definite plans to institute proceedings in Florida
elsewhere; and that she did not know of the Florida
oceedings until after they were instituted. Other facts
mentioned, but the foregoing is the foundation for
ultimate holding that the Agreement involved in the
tant case was not incident to the divorce.

n my judgment, Congress did not intend that the
ermination of whether or not an agreement is in-
nt to a divorce or separation should depend upon such
ndards as those adopted in the majority Opinion. The
nt of the wife, her anticipation or forecast of what
ht happen in the future, mutuality of intent on the
t of husband and wife, and like factors reflected only
he minds of the parties are vague and elusive. How-
r clear they may be in the instant case, if they are
pted as ultimate tests, it would seem apparent that
ases of this general type, they will inevitably lead to
usion, issues of fact, and difficult problems of proof
n area in which it is highly desirable for interested

parties to be as certain in advance of action as circumstances may permit.

An examination of the tests prescribed in the statute shows that Congress intended, to the extent possible, to establish definite and objective standards. The provisions of Section 22(k) require that there must be a divorce or legal separation. There must be a decree. There must be periodic payments. Such payments must be in discharge of a legal obligation. They must be imposed or incurred under a decree or a *written* instrument. If incurred under a written instrument, the instrument must be incident to the divorce or separation.

Eliminating, for the moment, the last factor, which is the focus of the dispute, each of the elements is clear and precise. The possibility of confusion is reduced to a minimum. The intangible factors of intent are absent.

In my judgment, the last factor is just as susceptible of measurement under the statute by precise standards as the other factors, and that Congress so intended. It seems to me to be apparent that where there is a written instrument providing for periodic payments in discharge of a legal obligation (or, in other words, in lieu of alimony), if such written agreement and the legal obligation which it discharges remain in effect at the time a subsequent decree of divorce or legal separation is granted, and if such written agreement (and the legal obligation which it discharges) survive such decree, the agreement must be deemed to be incident thereto. To my mind, such a construction is quite consistent with the language of the statute, and the application of such construction in implementing the statute will produce consistent results which accord with the patent objectives of the statute.

There can be no doubt that all of the circumstances which I have set forth in outlining my view of the essentials mounting up to an agreement incident to a divorce have actually occurred in the instant case. To

my mind, the effect of such concurrence of events cannot be defeated by a lack of intent on the part of the wife, or an active unwillingness on her part to come within the statute, or a failure on her part to understand that her acts would bring her within it, even though such lack of understanding was due to mistaken advice of counsel.

It appears to me that the views which I have expressed above in relation to the instant case likewise set forth the essence of the views of the Second Circuit as expressed in the *Moses* and *Lerner* cases, *supra*. The related effect of those cases is best understood by reading the Opinion in the *Moses* case as a sequel to the *Lerner* case, and by noting the close relationship of the facts in the *Moses* case to those in the instant case.

In the *Moses* case, the facts are substantially the same as those in the instant case, with one exception to be considered *infra*. The parties separated in 1943. A month later the wife brought an action for legal separation. After the trial commenced, it was halted while the parties attempted to work out a voluntary separation agreement. The husband wanted a divorce, but the wife was adamant against it. The parties desired to continue their efforts to agree upon terms of separation, and the proceedings were adjourned to give them further opportunity to agree. During the adjournment, respondent's attorney advised her that if she proceeded with her action and was successful in procuring a decree and an award for alimony, her husband could be punished for contempt if he failed to pay alimony as decreed, but that such payments would be taxable to her. He also advised her that if she entered into a voluntary separation agreement, the failure of the husband to make the agreed payments for support would not make him subject to contempt proceedings, but the payments would not be taxed to her. She chose to agree on the terms of a voluntary separation, and

executed the agreement in due course. She did not do so in contemplation of any divorce proceedings being instituted either by herself or her husband.

Up to the end of the foregoing statement, I might well have been summarizing the facts in the case now under consideration. I come now to the one difference, namely, the provisions of paragraph 21 of the agreement in the *Moses* case, *supra,* which read as follows:

> 21. The provisions of this agreement, to the extent that they may be acceptable to the court, may be incorporated in the final judgment or decree obtained in any action hereafter brought by either party against the other for a divorce in any court of competent jurisdiction. Notwithstanding such incorporation, the provisions hereof shall not be merged in any such judgment or decree but shall, in all respects survive the same.

No similar provision is to be found in the Agreement in the instant case.

After the Agreement was executed in the *Moses* case, subsequent events likewise paralleled those now before us. The New York proceeding was dismissed, and about five months after the execution of the Agreement the husband instituted a divorce action in Florida. The wife learned about it when she received notice of the suit. She did not contest it.

The husband obtained a decree of absolute divorce. The Agreement was not incorporated or referred to in the decree.

The precise language used in the Opinion in the *Moses* case is of great significance as a basis for further discussion, and I therefore quote *in extenso.* Chief Judge Chase said:

> Were it a condition precedent to the applicability of Section 22(k) to prove that when she made the

agreement it was done as part of an understanding with her husband that it would be followed by a suit for a divorce, we should not disagree with the decision of the Tax Court. But we have held otherwise in *Izrastzoff v. Commissioner*, 193 F. 2d 625, and *Lerner v. Commissioner*, 195 F. 2d 296. See also *Newton v. Pedrick*, 2 Cir. F. 2d dec'd April 28, 1954; *Feinberg v. Commissioner*, 3 Cir., 198 F. 2d 260, and *Commissioner v. Miller*, 9 Cir., 199 F. 2d 597; *Stewart v. Rothensies*, 114 Fed. Supp. 497.

As in the *Lerner* case, the issue in the *Feinberg* case was the right of the former husband to take deductions for payments pursuant to a separation agreement under Section 23(u), but the same reasoning is applicable and on the facts the case is so closely in point as to be indistinguishable.

Here the execution of the separation agreement was followed by the husband's Florida divorce within six months. It was by its terms to survive a divorce decree, whether incorporated in it or not, and these provisions make it abundantly clear that the possibility of a divorce was realized by the respondent when she executed the agreement, however much she may have been opposed to having such a thing accomplished. The question of alimony is germane to such a proceeding and where, as here, the provisions of the agreement were apparently a substitute for alimony which was satisfactory to the respondent, since she did not appear in the divorce action and make any attempt to have them increased, the nexus between the agreement and the divorce decree needed to make Section 22(k) applicable is present. What we said in the *Lerner* case, *supra*, at page 298 is equally pertinent here.

> The term 'written instrument incident to a divorce' was designed, we think, only to insure adequate proof of the existence of the obligation when divorce has occurred, • • •. So where the payments obviously take the place of alimony and otherwise satisfy the stringent requirements of I. R. C. §22(k), although not formally incorporated into the decree they should not be denied effect under the statute merely because there is no evidence that divorce and settlement were not contemporaneously planned and carried out.

While the opinion of the Court of Appeals in the *Moses* case takes careful note of the significance of paragraph 21 of the separation agreement, we think it clear from the discussion and the quotation from *Lerner v. Commissioner, supra,* reversing 15 T. C. 379, that the Court would have reached the same conclusion on principle even if the agreement had not contained paragraph 21. We think this is even more apparent upon consideration of that part of the opinion in *Lerner v. Commissioner, supra,* which immediately precedes the portion quoted with approval in the *Moses* case. In the *Lerner* case, Judge Clark said (p. 298):

> But this Court has recently recognized • • • that "There is no requirement in §22(k) of positive proof that both parties jointly and positively anticipated legal divorce or separation at the moment they signed the agreement. • • • Legislative emphasis upon a mutually coexisting intent for divorce is not to be assumed in the absence of an expressed requirement • • •. Such legislative history as is available stresses only the manifest fairness of charge to the wife and deduction by the husband of payments not only for alimony, but also for separate maintenance provisions 'in the

nature of or in lieu of alimony or an allowance for support.' * * *"

Even with this rationale it would still be possible * * * for the trier of facts to find that divorce was not contemplated at the time of the agreement and hence that the latter was not incident to the former. Such a critical examination of the facts appears to have been usual with the courts, although favoring the husband in actual result. * * *

This development, however, has posed a dilemma for tax attorneys, notably in states where the divorce might be avoided for collusion, * * * and it also has threatened to limit the indicated congressional policy of placing the tax burden of all general marriage settlement payments on the party entitled to their enjoyment. * * * Further reflection therefore constrains us to the view that Congress could hardly have intended so confined a meaning.

Immediately following the foregoing is the portion of the *Lerner* opinion quoted in *Florence B. Moses, supra.*

I have studied the language of the *Moses* and *Lerner* opinions with great care in the light of the legislative policy which resulted in the enactment of the provisions of the law here pertinent. It is my view that the principles expressed in those opinions are fully consistent with the legislative intent, and at the same time furnish an objective standard which will produce order and consistency in the place of prior confusion growing out of difficult problems of proof and disputed issues of fact.

In the instant case, the written instrument is adequate proof of the existence of the husband's obligation at the time the Florida decree was obtained. The weekly payments obviously take the place of alimony. The written instrument which was in effect at the time of the decree,

and survived the decree, was therefore incident to the divorce within the meaning of Section 22(k), although not formally incorporated into the decree, and despite the fact that it is clear that there was no mutuality of intent or plan that such agreement be made incident to the divorce.

It is my view, therefore, that the weekly payments totalling $2,200 paid to the wife in 1948, subsequent to the Florida decree, and the like payments to the wife totalling $2,600 in 1949, are deductible by the husband under the provisions of Section 23(u) and includible in the gross income of the wife under the provisions of Section 22(k) for the respective years and in the respective amounts above indicated.

I think it clear that the payments to the wife totalling $400 made in 1948 before the entry of the Florida decree are not includible in the wife's gross income and are not deductible by the husband. *Robert L. Daine*, 9 T. C. 47, aff'd (C. A. 2) 168 F. 2d 449.

ARUNDELL and TIETJENS, JJ., agree with this dissent.

APPENDIX III

(Opinion of the Court of Appeals)

UNITED STATES COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Nos. 42 and 123—October Term, 1955.

(Argued October 6, 1955 Decided October 25, 1955.)

Docket Nos. 23632 and 23633

HAROLD HOLT,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

MARGARET K. HOLT,
Respondent.

Before:

Clark, Chief Judge, and Medina and Lumbard, Circuit Judges.

Petitions for Review of decisions by the Tax Court, by the taxpayer in one and by the Commissioner of Internal Revenue in the other of two companion cases. The findings of fact and opinion of the Tax Court are reported in 23 T. C. No. 57, Opper, Judge. Reversed.

Cann, Lamb, Long & Kittelle, New York City, for petitioner Harold Holt.

Ellis J. Staley, Jr., Albany, New York, for respondent Margaret K. Holt.

H. Brian Holland, Assistant Attorney General, Ellis N. Slack, A. F. Prescott and Davis W. Morton, Jr., Attorneys, Washington, D. C., for Commissioner of Internal Revenue.

MEDINA, Circuit Judge:

We seem to play at hide-and-go-seek with the Tax Court in these alimony cases. Here again, despite the fact that the husband and wife were divorced after the execution of a separation agreement, pursuant to the terms of which sums were paid to the wife for support and maintenance, the Tax Court has held that the agreement was not "incident to such divorce" within the meaning of Section 22(k) of the Internal Revenue Code of 1939, 26 U. S. C. 1952 ed., §22, and that payments made to the wife as required by the terms of such agreement, in 1948 and 1949, were taxable to the husband and not to the wife.

It appears that the husband wanted the divorce but the wife did not; and she was adamant in her determination not to cooperate in any way, refusing to include in the agreement any reference to a possible divorce or a clause relative to the incorporation of the terms of the agreement in any decree of divorce. Moreover, she was advised by her counsel that the alimony payments would not be taxable to her. Contrary to her desire and expectation, and perhaps to her surprise, the husband promptly went to Florida and obtained a divorce, which the wife decided not to contest. We may assume that the wife would not have signed the agreement had she been aware of the course the husband was to pursue. Because of the lack of "mutuality of intent or plan," the Tax Court, notwithstanding a vigorous dissent by Judge Fisher, in which Judge Arundell and

Judge Tietjen concurred, held the agreement was not "incident to such divorce." But our repeated decisions on this subject have been founded upon principles which make irrelevant such incidental matters as those now held by the Tax Court to be decisive.

Thus in *Lerner v. Commissioner of Internal Revenue,* 195 F. 2d 296, 298 (C. A. 2, 1952), we held, "[T]he term 'written instrument incident to such divorce' was designed, we think, only to insure adequate proof of the existence of the obligation when divorce has occurred * * *" In *Newton v. Pedrick,* 212 F. 2d 357 (C. A. 2, 1954), thinking to set the matter at rest, at least in this Circuit, we intended to cut through the endless combinations of miscellaneous versions of the preliminaries to these matrimonial arrangements, and give the statute an interpretation which would express the legislative intent and at the same time eliminate confusion and uncertainty by holding that the words "incident to such divorce," "should be read as referring to the *status* rather than merely the *decree* of divorce or separation." (Emphasis that of the Court.) Thus where a legal obligation to support survives the dissolution of the marital relationship and such obligation is evidenced by the terms of a written agreement, as in the case now before us, the wife must pay the income taxes on the amounts received by her for support and maintenance. This principle was reaffirmed by this Court in *Commissioner of Internal Revenue v. Moses,* 214 F. 2d 912 (C. A. 2, 1954), citing *Lerner, Newton* and other cases. It is, accordingly, immaterial whether the husband and the wife or either of them intend that the agreement shall be "incident to the divorce." The respondent Margaret K. Holt must pay the taxes at issue in her case, and petitioner Harold Holt is entitled to the deductions claimed by him.

Reversed in both cases.

APPENDIX IV

(Judgment of the Court of Appeals)

UNITED STATES COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of October, one thousand nine hundred and fifty-five.

Present:

Hon. Charles E. Clark,
Chief Judge,
Hon. Harold R. Medina,
Hon. J. Edward Lumbard,
Circuit Judges.

COMMISSIONER OF INTERNAL REVENUE, Petitioner,	
v.	
MARGARET K. HOLT, Respondent.	

Appeal from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

A. DANIEL FUSARO,
Clerk.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and Regulations involved	2
Statement	2
Argument	6
Conclusion	10
Appendix	11

CITATIONS

Cases:

Commissioner v. *Miller*, 199 F. 2d 597	8
Commissioner v. *Moses*, 214 F. 2d 912	7, 8
Commissioner v. *Walsh*, 183 F. 2d 803	9
Cox v. *Commissioner*, 176 F. 2d 226	9
Feinberg v. *Commissioner*, 198 F. 2d 260	9
Izrastzoff v. *Commissioner*, 193 F. 2d 625	8, 9
Lerner v. *Commissioner*, 195 F. 2d 296	8, 9
Moses v. *Commissioner*, 18 T.C. 1020	7
Newton v. *Pedrick*, 212 F. 2d 357	8
Walsh v. *Commissioner*, 21 T.C. 1063	10

Statute:

Internal Revenue Code of 1939, Sec. 22 (26 U.S.C. 1952 ed., Sec. 22)	7

Miscellaneous:

H. Rep. No. 2333, 77th Cong., 2d Sess., p. 72	8
S. Rep. No. 1631, 77th Cong., 2d Sess., p. 84	8
Treasury Regulations 111, Sec. 29.22(k)-1	13

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 631

MARGARET K. HOLT, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

In both the Tax Court and the Court of Appeals for the Second Circuit the instant case was consolidated, by agreement of the parties, with the companion case of *Harold Holt* v. *Commissioner*. The findings of fact and opinion of the Tax Court (Pet. 20-36) are reported at 23 T. C. 469. The opinion of the Court of Appeals (Pet. 37-39) is reported at 226 F. 2d 757.

JURISDICTION

The judgment of the Court of Appeals (Pet. 40), reversing the Tax Court's decision in favor of the

petitioner, was rendered on October 25, 1955. The petition for a writ of certiorari was filed on January 23, 1956. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, within the meaning of Section 22(k) of the Internal Revenue Code of 1939, a pre-divorce voluntary settlement agreement providing for periodic payments by husband to wife was incident to a subsequent divorce procured by the husband, so that the post-divorce payments received by the wife were properly includible in her gross income for federal tax purposes.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the statute and Regulations, Section 22(k) of the Internal Revenue Code of 1939, and Section 29.22(k)-1 of Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939, are set forth in the Appendix, *infra,* pp. 11-13.

STATEMENT

The pertinent facts, as stipulated, developed at the trial, and set forth in the Tax Court's opinion (Pet. 21-25) are as follows:

Harold Holt and Margaret K. Holt, both residents of New York and cash basis calendar year taxpayers, were married on August 28, 1924. They both filed their returns in Albany, New York. The taxable years here in issue are 1948 and 1949. (Pet. 21-22.)

In February, 1947, Margaret Holt, petitioner herein, commenced a New York State action for separation. Upon her motion, dated May 13, 1947, the Supreme Court, Albany, New York, ordered her husband to pay $50 per week for support and maintenance. (Pet. 22.)

Outside of court, the then spouses, on December 24, 1947, entered into a separation agreement containing provisions for various payments of $50 per week for support and maintenance so long as she should live and not remarry. (Pet. 22.) The action for legal separation previously instituted by Margaret Holt was discontinued by order of the New York Supreme Court, at Albany, on January 5, 1948, pursuant to a stipulation for discontinuance filed by the parties. (Pet. 22.)

On January 22, 1948, Harold Holt instituted an action for divorce in Dade County, Florida, on grounds of desertion. On February 27, 1948, the Florida court awarded Harold a final decree of divorce *a vinculo matrimonii*. The agreement of December 24, 1947, was not incorporated in the decree. The decree made no reference to the agreement and made no provision for the wife's support and maintenance. The agreement was not presented to the court because it was feared the Florida court might draw the conclusion that there had been collusion. (Pet. 22-23.)

Margaret and Harold Holt had been permanently separated since sometime in 1945, although Margaret had made unsuccessful attempts to bring about a reconciliation. From the time of the sepa-

ration Harold Holt wanted a divorce. Margaret was aware of this but at all times opposed the idea. She had no knowledge of any definite intention on Harold's part to obtain a divorce and was not informed of the Florida proceeding until after it was instituted. She had previously refused to file divorce proceedings. The separation proceedings in New York were filed by her in the belief that this was the only means by which she could force her husband to furnish support and maintenance. Negotiations during the pendency of these proceedings resulted in the agreement of December 24, 1947, which accomplished her objective, and the proceedings were dismissed. (Pet. 23.)

The usual provision that in the event of a divorce the terms of the separation agreement might be incorporated in the divorce decree was not included in the separation agreement of December 24, 1947, because Margaret would not agree. She was opposed to anything which would in any way indicate a divorce. (Pet. 24.)

During the negotiations which led to the separation agreement of December 24, 1947, neither Margaret nor her attorney was informed that Harold Holt had gone or was going to Florida to establish a residence there and institute divorce proceedings. At the time Harold Holt did contemplate such action, and had already begun to establish a Florida residence. (Pet. 24.)

When Margaret K. Holt was first notified of the Florida divorce proceedings, she requested her attorney to appear and defend them. However, on

her attorney's advice, she decided not to contest. (Pet. 24.)

At the time Margaret entered into the December 24, 1947 agreement, her attorney advised her that she would not have to pay income tax on the weekly support and maintenance payments provided for therein. The agreement provided, *inter alia* (Pet. 24):

> * * * Except, however, that the wife does not release, nor shall this agreement be construed to release, any obligation of the husband to his wife or her attorneys for legal services and disbursements in any action or proceeding which may arise in the future, including any action or proceeding in connection with the provisions of this agreement.

Subsequent to the granting of the final decree of divorce on February 27, 1948, Harold Holt made weekly payments to Margaret totaling $2,200 in 1948 and $2,600 in 1949. (Pet. 23.) Harold took deductions for such payments on his 1948 and 1949 federal income tax returns. Margaret did not report such amounts on her corresponding federal income tax returns. (Pet. 21.)

The Commissioner assessed deficiencies against Harold Holt and also against Margaret K. Holt, as follows (Pet. 21):

	Year	*Deficiency*
Harold Holt	1948	$ 550.78
Harold Holt	1949	583.34
	[Total	1,134.12]
Margaret K. Holt	1948	464.58
Margaret K. Holt	1949	479.00
	[Total	943.58]

As ultimate facts, the Tax Court found that there was no mutuality of intention on the part of the then spouses that the agreement of December 24, 1947, and the weekly payments thereunder were to be deemed incident to a subsequent divorce, in Florida or elsewhere. In addition, it was found that there was no mutuality of understanding between the then spouses that, in event of divorce, the December 24, 1947, agreement was to be incorporated in the decree for purposes of determining federal income tax consequences. Finally, it was found that neither the December 24, 1947, agreement nor the Florida decree made reference to the existence of the other. The decree made no provision for support and maintenance. Nor was the earlier agreement brought to the attention of the Florida court. (Pet. 25.)

The Tax Court (Pet. 26-28), with three judges dissenting (Pet. 28-36), held that, under the facts as found, the weekly payments were not made under an agreement incident to a divorce within the meaning of Section 22(k) of the Internal Revenue Code of 1939, and, accordingly, were not includible in the gross income of taxpayer-wife. The Court of Appeals for the Second Circuit (Pet. 37-39) reversed the Tax Court and held that the post-divorce payments were taxable to the wife.

ARGUMENT

1. The Court of Appeals correctly held that the post-divorce periodic payments made to the taxpayer-wife pursuant to a pre-divorce voluntary

settlement agreement were includible in her gross income and deductible by her ex-husband. Under Section 22(k) of the Internal Revenue Code of 1939 (Appendix, *infra,* pp. 11-12), such payments are taxable to the wife if they are "received * * * in discharge of * * * a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such [divorce or separation] decree or under a written instrument incident to such divorce or separation * * *." As the court below held, both this language and the purpose of its enactment are served by holding payments like the ones in this case taxable to the wife who receives them rather than to the former husband making them.

On the theory that the taxpayer's earlier expressed opposition to divorce foreclosed any possibility that eventual divorce could have been contemplated by the parties at the time of entering into the pre-divorce separation agreement, the Tax Court held (Pet. 28) that the post-divorce payments were not made under an agreement incident to a divorce within the meaning of Section 22(k). In so holding, the Tax Court relied principally on its decision in *Moses* v. *Commissioner,* 18 T. C. 1020, which was subsequently reversed, 214 F. 2d 912 (C. A. 2d). Properly rejecting this narrowing construction, the Court of Appeals held it sufficient that the agreement and the subsequent divorce combined as a settlement of the spouses' marital difficulties—with the divorce decree effecting a change in the marital status while the agreement,

retaining its validity subsequent to the decree, imposed a continuing "legal obligation * * * because of the marital * * * relationship" within Section 22(k).

The result is the one intended by Congress, as revealed by the identical Committee explanations of Section 22(k) (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 72; S. Rep. No. 1631, 77th Cong., 2d Sess., p. 84):

> This section applies only where the legal obligation being discharged arises out of the family or marital relationship in recognition of the general obligation to support, which is made specific by the instrument *or* decree. [Emphasis added.]

For the substantial purpose sought by this allocation of taxes in alimony situations, taxability to the recipient is plainly required where the agreement stands as proof of the husband's obligation, with the payments thereunder corresponding identically in practical effect to payments expressly directed by the decree. The idea of superimposing a further requirement that taxability should turn upon the subjective intent of the spouses at the time of entering into the pre-divorce agreement has been correctly rejected by the court below and other courts of appeals. See *Lerner* v. *Commissioner*, 195 F. 2d 296 (C. A. 2d); *Izrastzoff* v. *Commissioner*, 193 F. 2d 625 (C. A. 2d); *Newton* v. *Pedrick*, 212 F. 2d 357 (C. A. 2d); *Commissioner* v. *Moses*, 214 F. 2d 912 (C. A. 2d); *Commissioner* v.

Miller, 199 F. 2d 597 (C. A. 9th); *Feinberg* v. *Commissioner*, 198 F. 2d 260 (C. A. 3d).

2. There is, contrary to taxpayer's contention (Pet. 7-10), no conflict requiring resolution by this Court. *Cox* v. *Commissioner*, 176 F. 2d 226 (C. A. 3d), claimed to be a conflicting decision, involved an agreement for payments by a former husband entered into *after* the divorce. Approving the Tax Court's holding that to be "incident to" a divorce the agreement should have been made "prior thereto or coincident therewith" (p. 228), the Court of Appeals said (p. 229):

> The divorce prima facie terminated the petitioner's marital obligations; no agreement was reached until eight months afterward.

The holding there, that the agreement was designed "to preserve [the former husband's] divorced status" (against a threatened attack on his Florida divorce), and was therefore not the kind contemplated by Section 22(k), is fully consistent with the decision on the different facts of the instant case.

Moreover, the Third Circuit has more recently made clear its agreement with the Second, observing that it is "in complete accord" with the decisions, similar to the one in this case, in *Lerner* v. *Commissioner*, 195 F. 2d 296, and *Izrastzoff* v. *Commissioner*, 193 F. 2d 625. See *Feinberg* v. *Commissioner*, 198 F. 2d 260, 262 (C. A. 3d).

Equally unavailing is the assertion of a conflict with *Commissioner* v. *Walsh*, 183 F. 2d 803 (C. A.

D. C.). Like the Third Circuit's decision in *Cox, supra,* this case too involved an agreement made long after the divorce decree. See 183 F. 2d at 805. And it is interesting to note that the Tax Court, affirmed in that case by a divided Court of Appeals, later acknowledged unanimously that the decision was erroneous. *Walsh* v. *Commissioner,* 21 T. C. 1063, 1068.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
CHARLES K. RICE,
Acting Assistant Attorney General.
A. F. PRESCOTT,
DAVIS W. MORTON, JR.,
Attorneys.

FEBRUARY, 1956.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * *

(k) [As added by Section 120(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*—In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for

the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171(b).)

(26 U. S. C. 1952 ed., Sec. 22.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.22(k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—(a) *In general.*— * * *

In general, section 22(k) requires the inclusion in the gross income of the wife of periodic payments (whether or not made at regular intervals) received by her after the decree of divorce or of separate maintenance. Such periodic payments may be received from either of the two following sources:

(1) In discharge of a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by the husband, * * *

* * * * *

The obligation of the husband must be imposed upon him or assumed by him (or made specific) under either of the following:

* * * * *

(2) A written instrument incident to such divorce or legal separation.

* * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1956 378324 956